



Seattle City Council

October 7, 1997

Office of the Secretary
Federal Communications Commission
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

OCT -8 1997

FEDERAL COMMUNICATIONS COMMISSION

Re: Comments of City of Seattle in the Matter of Procedures for Reviewing Requests for Relief from State and Local Regulations Pursuant to Section 332(c)(7)(B)(v) of the Communications Act of 1934
WT Docket No. 97-192

Local governments have a legitimate and essential role to play in telecommunications regulation and right-of-way management and the exercise of that authority is generally consistent with federal policy as embodied in the Federal Telecommunications Act of 1996. As President of the Seattle City Council and Chair of Seattle's Technology & Telecommunications Committee, we must therefore take issue with the above-referenced rule currently being proposed by your agency on the following grounds.

1) Proposed definition of "final action" is flawed because it fails to permit local jurisdictions to complete their administrative process.

The City of Seattle disagrees with the Commission's interpretation of "final action."

Paragraph 137 of the proposed rule appropriately references the Conference Report concerning the "final action" as the final administrative action at the state or local government level. The example given in paragraph 137, however, is flawed, because it fails to recognize that an appeal process internal to the jurisdiction is part of the local administrative process.

In the City of Seattle, parties aggrieved by a Department of Construction and Land Use decision may take a speedy appeal to a Hearing Examiner, who is part of Seattle's recommendation and decision process in land use actions. In certain limited circumstances, the final action is taken by the City Council in its quasi-judicial capacity. The City believes that the final administrative action should be defined as the last step a party must take prior to taking a decision to court. Any other arrangement would result in a local government defending a departmental decision before the FCC instead of the "final action." Further, allowing the local jurisdiction to complete its normal appeal process creates a better record for the FCC to review.

No. of Copies rec'd
List A/B/C/D/E

OHY

In Seattle, the hearing examiner process results in a full, on-the-record hearing in which all parties are able to introduce evidence, examine and cross-examine witnesses, and present oral and written argument on the merits of their positions. Under Washington State law, the record of such a hearing is reviewed by courts without the need to take further evidence. It would be a mistake for the Commission to attempt to review local decisions without the benefit of a fully developed record.

Moreover, were the Commission to choose to intervene before the local administrative process is complete, this would unfairly tip the balance in favor of licensees who more frequently maintain legal representation in Washington, D.C. and are better able to address such simultaneous actions.

2) A national timeline for local action is unwarranted and impractical.

With regard to “failure to act”, discussed in paragraph 138, the proposed approach (recognizing usual and customary processing times for similar applications) is appropriate, and we agree that there is no reason to give preferential treatment to wireless providers’ applications. The State of Washington allows 120 days for administrative decisions such as zoning variances and conditional uses. This countdown regulates only governmental processing time after a complete application is submitted, and does not include time for the applicant to respond to correction notices. We believe that a national standard - in terms of number of days - is not practical or appropriate, especially in light of the Commission’s recognition of the necessity for local autonomy.

3) It is inappropriate for the Commission to intervene where the local agency decision is not predicated on RF emissions testimony.

The City understands that the Commission has statutory authority to intervene where a local governmental decision to deny is based on rf radiation if the project meets federal standards. However, when a local denial is based on a record which, when taken as a whole, substantiates the denial on a legitimate basis, the evaluation should be undertaken on the merits of that basis and not assumed a priori to be tainted merely because there is some reference to rf radiation in the record. Where the record does not include reference to emissions, the Commission should assume the reasons cited for the decision are adequate to sustain the denial and leave any subsequent review of the decision to the courts.

The example described in paragraph 140 is flawed. Numerous citizens could come to a hearing and indicate that they oppose the tower for several reasons including the height towering over the homes, the lack of any attempt to make the tower design compatible with the neighborhood and their concern about emissions. Because their testimony included the third reason makes the other two reasons no less valid. If the government's decision cited only the two allowable reasons, the Commission should not intervene. Rather, the proponent should either revise the application to ameliorate those two concerns or seek judicial review to determine whether the basis of the denial is substantive.

A parallel example should give caution to the FCC if it is seeking to muzzle citizens' rights of free speech. HUD's efforts to sue citizens (under the Federal Fair Housing Act) who objected to group homes being sited in their neighborhoods have been loudly denounced as contrary to the constitutional right to free speech. FCC's proposal may be subject to the same harsh criticism.

4) Certification of Compliance

The City of Seattle supports the recommendation of the Local and State Government Advisory Committee as contained in Recommendation #5. The City opposes any effort on the part of the FCC to deprive local government of the ability to require and receive accurate and timely information as to the applicant's compliance with FCC emission standards. Unless all information is part of the local record for public review, the issue of emissions will almost inevitably become a cause for public concern, perhaps overshadowing legitimate local issues. The likelihood of the matter becoming somehow tainted and thus subject to Commission review would be heightened under such circumstances.

The City has recently drafted an "Applicant's Statement of FCC Compliance" in which we ask the applicant to certify the measurements/calculations used to support the statement that the proposal meets FCC rf radiation requirements, and an affidavit including the signator's qualifications to make the measurements. We are requesting a NIER report when an Environmental Assessment is required, and when transmitting antennas are proposed on rooftops of residential buildings when those rooftops are also proposed to be the location of required accessible open space. We believe this is a reasonable approach which assures citizens that federal standards are met without imposing an undue or unnecessary burden on the applicant, who would have had to prepare these documents and information for the FCC in any case. The applicant should pay for the documentation of FCC compliance; it would be inappropriate to expect the taxpayers to do so.

5) Public process

There are many legitimate concerns regarding these facilities other than emissions, and local authorities must be responsive to citizens in acting to protect the health, welfare and safety of the community. We must be able to regulate reasonably, affording our citizens appropriate opportunities to participate in land use processes. This can be done efficiently and fairly without intruding into issues reserved for federal oversight, and without the need for federal review of individual permit decisions.

Thank you for considering our comments. If you have any questions regarding these comments, please contact us through Matthew Lampe at (206) 684-0504 or by e-mail Matt.Lampe@ci.seattle.wa.us.

Sincerely,



Jan Drago
President, Seattle City Council
Chair, Business, Economic and Community Development Committee



Tina Podlowski
Chair, Technology and Telecommunications Committee

cc: Mayor Norman B. Rice